IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)
Description of Case

F.A. No. 568 of 2001

Date of decision:- 03-7-2006

A.F.R. (Approved for Reporting)

~~Not Approved for Reporting~~

Date:- 03-7-2006 Initials of Judge

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NINITAL

First Appeal No 568 of 2001
(Old First Appeal No. 427 of 1985)

The State of Uttaranchal
Through Collector, Uttarkashi ...Defendant/Appellant

Versus

Hukum Singh
S/o Shri Ratan Singh aged 46 years
Village Barethi Patti Bist,
P.O. Dharasu
District – Uttarkashi
Plaintiff/respondent ...

Sri Nand Prasad, learned Standing Counsel for the appellant.
Sri Rajendra Dobhal, learned counsel for the appellant.

Hon'ble J.C.S. Rawat, J.

This First Appeal has been filed to set aside the judgment and decree dated 03.05.1985 passed by Sri V.C. Agrawal, the then learned District Judge, Uttarkashi in Original Suit No. 6 of 1982 decreeing the suit of the plaintiff/respondent for the recovery of Rs. 26,608.11 with proportionate costs and he further directed pendentelite and future interest at the rate of 9% per annum.

Brief facts for the disposal of this appeal are that a suit was filed for the recovery of Rs. 40,000/- for the work done by the plaintiff/respondent for the construction of Badali Canal, Job No. 2, District Uttarkashi. According to the plaint allegations, the Irrigation Department, Uttarkashi invited the tenders for the construction of the said canal. According to the plaintiff/respondent, tenders for Rs. 1,31,469/- was accepted by the defendant/appellant for the execution of the said work. After accepting the said tender on 16th July 1978, an agreement was executed in between the plaintiff/respondent and the

defendant/appellant. It was also agreed in between the parties that the work to be started from 16th December, 1978 and it was to be completed by 15th August, 1979. Time was the essence of the contract. It was also provided under the Contract that the cement had to be supplied by the defendant/appellant. The cost of which was to be deducted from the bills of the plaintiff/respondent. The plaintiff/respondent had to deposit the earnest money as agreed between the parties. The plaintiff/respondent went to the site on 18th December, 1979 alongwith labourers but he found that there was no signs of cutting at the site and the plaintiff/respondent made a request to that effect to the defendant/appellant . When plaintiff/respondent reached at the site on 18th December, 1979, he found that there were a number of trees of forest department standing on the said land and the plaintiff/respondent informed the defendant/appellant to have the trees cleared so that the work may be executed. The said trees were not cleared till 18.08.1979 till the date when the work was to be completed. It was further alleged by the plaintiff/respondent that the defendant/appellant did not provide the cement till 17.02.1979 in spite of the repeated requests made by the plaintiff/respondent to the defendant/appellant. Only 60 bags of cement were issued to the plaintiff/respondent in the month of February, 1979. it was further alleged that the drawings of patra cutting given to the plaintiff/respondent did not tally with the spot and the officials of the Irrigation Department did not co-operate with plaintiff/respondent. The plaintiff/respondent further alleged din the plaint that the trees were not removed and cement was also not provided to him and he could not complete the work till 15.08.1979. The

plaintiff/respondent also requested to the defendant/appellant to measure the work done but no heed was paid by the department. The measurement work taken on the back of the plaintiff/respondent by the defendant/appellant ultimately on 23.05.1981. The remaining work was entrusted to another contractor without rescinding the contract of the plaintiff/respondent and the another contractor disfigured the work already done by the plaintiff/respondent . the plaintiff/respondent had also alleged that he had done work of Rs. 84,060/- and only Rs. 46,673/- were paid. After deducting Rs. 1,350/- for cement, the plaintiff/respondent was entitled to get Rs. 36,037/- besides Rs. 12,214/- as earnest money. The plaintiff/respondent served a notice upon the defendant/appellant but the defendant/appellant did not pay the claimed amount as such, suit for recovery of Rs. 40,000/- was filed before the trial court.

The defendant/appellant filed the written statement alleging therein that the time was not the essence of the contract. The plaintiff/respondent did not start the work for which a notice dated 03.01.1979 was issued to him. It was further alleged in the written statement that it was the bounden duty of the plaintiff/respondent to construct the pillars and level khuntis were to be fixed after that, which the plaintiff/respondent failed to do so. The defendant/appellant further alleged in his written statement that no trees existed at the site. The plaintiff/respondent had wrongly claimed that he had competed 95% of patra cutting work. Pursuant to that agreement, the defendant/appellant supplied 60 bags of cement on the demand of the plaintiff/respondent and that quantity was sufficient for the construction of the pillars.

The defendant/appellant was not guilty for the delay in doing the work. The defendant/appellant further alleged that the plaintiff/respondent was not willing to work further and he was guilty for the delay of doing the work. The defendant/appellant also stated in his written statement that the work was measured by the defendant/appellant in presence of the plaintiff/respondent and it was entered in the measurement book rather he refused to sign the same. At the request of the plaintiff/respondent, the work already measured by the J.E., Hat Ram were checked again in the presence of the plaintiff/respondent by the Assistant Engineer In-charge and that measurement were found correct. After inviting the plaintiff/respondent, J.E. was sent again to measure the work at the site on 23rd May, 1981 but inspite of the service of the letter, the plaintiff/respondent did not reach at the spot. Thereafter, the contract of plaintiff/respondent was rescinded by the defendant/appellant and the remaining work was entrusted to another contractor. The defendant/appellant had also alleged in his written statement that the plaintiff/respondent did the work of Rs. 62,536/- only and a sum of Rs. 46,673/- had been paid to him including the cost of cement. The defendant/appellant further alleged that the remaining amount of Rs. 15,863/- was to be adjusted against the other items which has been written in the written statement. It was further alleged that the appellant had suffered loss of Rs. 52,519/- and as such the plaintiff/respondent is not entitled to get the security amount from the defendant/appellant.

The Trial Court after perusal of the pleading framed the necessary issues. The learned trial court had come to the conclusion that time was the essence of the contract.

The plaintiff/respondent could certainly not be blamed for omitting to start the work before 03.01.1979. The trial court has further held that the initial delay was on account of default of the defendant/appellant. It was further held that the trees standing on the site had not been removed till 15.08.1979, i.e. last date for the completion of the work and the plaintiff/respondent could not execute the work due to the fault of the defendant/appellant. The learned trial court has further held that the defendant/appellant supplied the 60 bags of cement in the month of February, 1979 thereafter, the cement was supplied in the month of May. It was further held that the defendant/appellant was responsible for the delay and for the non-completion of the work. The learned trial court after going through the entire assessment of the work, held that the plaintiff/respondent was entitled to get a sum of Rs. 62,537.11 on account of the work done by him and he further held that the defendant/appellant was also liable to pay a sum of Rs. 1,470/- as cost of cement. Beside this he had already received Rs. 46,673/- as sunning payment. Thus after adjusting these amounts, the plaintiff/respondent was entitled to get Rs. 14,394.11 only beside the amount of security deposit which was Rs. 12,214/-. Thus the suit was decreed for a sum of Rs. 26,608.11 with proportionate costs and pendetelite and future interest at the rate of 9% per annum.

Heard learned counsel for the parties and perused the record.

Learned counsel for the defendant/appellant (Sri Nand Prasad, learned Standing Counsel) pointed out that time was not the essence of the contract. It was further contended that the defendant/appellant could have

extended the time on he request of the plaintiff/respondent and the defendant/appellant was all along willing to extend the time. The learned counsel further pointed out that the intention of the defendant/appellant would be apparent from the letters written subsequent to that date. Learned counsel for the plaintiff/respondent refuted the contention and contended that the work was admittedly to be completed on 15.08.1979 according to the contract. It was also pointed out that there is a clause in the agreement that the time would be the essence of the contract. If the contract itself appears the condition that the time is the essence of the contract then the intention of the parties could not be taken into account. Letters which have been written by the defendant/appellant after 15.08.1979 for extending the time was unilateral consideration. It was not obligatory on the part of plaintiff/respondent to accept the said offer made by the department. It is also evident from the record that the work was to be completed on 15.08.1979 and there was no communication from the defendant/appellant that the trees had been standing on the site and the time which they have already spent in obtaining the sanction would be excluded from the contract. Such advice offered had not been made prior to 15.08.1979 and the defendant/appellant would have taken into consideration the cost of the construction. Defendant/appellant would not have taken into consideration the escalation charges in case the contract of construction would have been extended. There was a specific clause in the contract that time would be essence of the contract. It was natural for the plaintiff/respondent to assume that the rates prevailing till 15.08.1979 would

be rates for which he could execute the work. There was no clause in the agreement which provides that in case the work is not completed the escalation charges would be provided to the contractor according to the rates declared by the department subsequently. Apart this, clause 2-B of the said agreement is very clear wherein it has been held that in case the work is not executed within the stipulated period, the penalty would be provided to complete the work within the period of one month. This circumstance reveals that the time was the essence of the contract. I am completely in agreement with the findings recorded by the learned trial court in this regard.

Learned standing counsel for the defendant/appellant further contended that the plaintiff/respondent was supplied the cement for construction of the pillars. According to the requirement, the plaintiff/respondent was not requiring more quantity of the cement. The learned counsel for the plaintiff/respondent refuted the contention. It was further contended by the learned counsel for the plaintiff/respondent that the required quantity of cement for the construction of the pillars was not supplied to the plaintiff/respondent in spite of his repeated requests. It was further contended that the several letters were given to the defendant/appellant to supply the cement but no heed was paid by the defendant/appellant. Perusal of the record reveals that the plaintiff/respondent had sent the letters dated 24.03.1979, 12.04.1979 and 24.04.1979 Ex. 11, 20 and 21 respectively. The plaintiff/respondent had demanded the cement from the defendant/appellant by these letters. It is admitted that 60 bags of cement was supplied to construct the pillars in the month of February, 1979. It is also in the evidence that thereafter, further

supply of cement was made on 20.06.1979. It is obvious from the record that the work was to be started in the month of December, 1979 and the first instalment of cement was supplied in the month of February, 1979 and thereafter two months prior to the completion of work some cement was given to the contractor-plaintiff/respondent. It is an admitted case of the parties that the plaintiff/respondent really constructed the pillar at the spot. He had to prepared pakki nail and had also to attend the cement concrete work which was assigned to plaintiff/respondent. Het Ram-DW3, Junior Engineer had stated actually after the supply of 60 bags of cement, further supply was made only in the month of June, 1979 to the plaintiff/respondent. This conduct of the defendant/appellant leads to take inference that the contention of the plaintiff/respondent was correct that the cement was not supplied to the plaintiff/respondent inspite of his repeated documents. Dayashanker Lal-DW1 had further stated in his evidence that the level khuntis were to be fixed before starting the work and level pillars on those places were to be prepared by the cement. Obviously the cement was required by the plaintiff/respondent and the contention of the learned counsel for the defendant/appellant is contrary to the fact and circumstance of the case. I am completely in agreement with the findings recorded by the learned trial court. I do not find any force in the contention of the learned counsel for the defendant/appellant that the plaintiff/respondent was not requiring the cement generally.

No other arguments were raised on behalf of the learned standing counsel for the defendant/appellant.

There is a cross objection filed by the plaintiff/respondent in this case. Learned counsel for the plaintiff/respondent contended that the plaintiff/respondent completed the work of patra cutting upto 95% and the learned trial court erred in holding that the work of 65% was done at the spot. Learned counsel for the plaintiff/respondent further contended that the plaintiff/respondent immediately informed the defendant/appellant to get measurement done but it was not done and it was not entered into the measurement book and the said work was disfigured and could not be measured at the spot. Learned Standing Counsel for the defendant/appellant refuted the contention and contended that the work was assigned to another contractor in the year 1981. It was further contended that the measurement were made by the defendant/appellant in presence of the plaintiff/respondent but he refused to sign the same. He further contended that the said measurements made by the Het Ram-DW3 were again checked in presence of the Assistant Engineer In-charge and the measurements were found correct. He further contended that with all the satisfaction J.E., Het Ram was again sent at the spot on 23.05.1981. In spite of the notice to the plaintiff/respondent, he did not reached at the spot for the measurements. The learned standing counsel further contended that the defendant/appellant had tired his level best to record the measurements of the work done in the presence of the plaintiff/respondent. The plaintiff/respondent did not co-operate with the defendant/appellant. It was further contended that the work was assigned after the measurement made and thereafter there was no question of making any

disfigurement in the site work by the new incumbent contractor. Learned counsel for the plaintiff/respondent further contended that there is no reliable evidence on record which reveals that the said measurement conduced by the defendant/appellant was correct. The learned trial court after appraisal of the evidence had held each and every items in its judgment. He had further held that the assessment made by the plaintiff/respondent to complete the work at the extent of 95% was not found correct. The trial court has discussed each and every item in this respect. I do not want to reiterate the same findings in my judgment . I am completely in agreement with the findings recorded by the learned trial court. The learned trial court had also assessed that the work assessed by the department was correct. Apart this it is pertinent to mention here that the said work was measured by J.E., Het Ram and plaintiff/respondent was present at that time and he did not sign on the measurement book. If he had any objection, he could have written on the said measurement book with regard to the assessment of the work. Thereafter, the said work was checked by the Assistant Engineer In-Charge which was found incorrect to the satisfaction of the plaintiff/respondent again after due service of the notice the work was again assessed but the plaintiff/respondent did not participate in such measurement. The said measurement were found correct by the Assistant Engineer. If the plaintiff/respondent was dissatisfied with the said assessments or measurements, he could have assessed and measured these work by any other engineer of any other department. It was opened to the plaintiff/respondent to get the measurements of the work done by any other J.E., Assistant Engineer or

Executive Engineer. The plaintiff/respondent had not lead any evidence that he got measured the work by any independent agency. In absence of such evidence, the evidence of defendant/appellant was credible and cogent. The bared statement of the plaintiff/respondent that he completed the 95% of work cannot be taken into account.

In view of the foregoing discussion, I am completely in agreement with the findings recorded by the learned trial court. The appeal devoids of merit is liable to be dismissed and is accordingly dismissed.

Costs easy.

All application spending in this case are stand disposed of in terms of the judgment.

(J.C.S. RAWAT, J.)

03rd July, 2006
Shiv